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REPORT
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APPOINTMENT OF REPRESENTATIVES

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Mr. KEFAUVER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S.J. Res. 39]

The Committee on the Judiciary, to which was referred the resolution (S.J. Res. 39) to amend the Constitution to authorize Governors to fill temporary vacancies in the House of Representatives, having considered the same, reports favorably thereon, without amendment, and recommends that the resolution do pass.

PURPOSE

The purpose of the proposed legislation is to amend the Constitution to enable the executive authority of each State to make temporary appointments to fill vacancies in representation in the House of Representatives whenever such vacancies exceed half the authorized membership of that body.

STATEMENT

When the Constitution was drafted, the ability to destroy people on a mass basis by use of weapons of war had not been developed. It was, therefore, highly unlikely that the membership of the House of Representatives could be so decimated as to render that body incapable of exercising its constitutional functions. Indeed, the Founding Fathers had no basis on which to predicate any such assumption.

Regrettably, this is not the situation today. The Federal Administrator of Civil Defense has testified:

> Today, with the advent of the atomic bomb and similar devices, we know that vast areas can be devastated almost instantaneously. We also know that no system of defense is likely to be 100 percent effective. In other words, we realize that in any future war it is probable that the enemy would succeed in attacking our civilian communities.

This advance in the technique of destruction has necessitated a reexamination of the ability of our representative Government to function in time of national disaster. A brief review establishes that continuity of the Executive authority is protected by the act of June 25, 1948 (ch. 644, sec. 1, 62 Stat. 672), regulating presidential succession. The judiciary could be reconstituted fairly readily by appointments by the Chief Executive. Any vacancies in the Senate could be temporarily filled by appointments by the Governors of the respective States. But in the House of Representatives, where revenue measures must originate, vacancies must be filled by special elections, and such elections may require a minimum lapse of 60 days.

Thus, as it stands today, the Constitution confers no authority on State Governors to appoint Members to the House of Representatives. This inability to provide for continuity of representation offers no insurmountable difficulty in ordinary times. But in periods of national emergency or disaster, it could well paralyze the functioning of representative government. As the Administrator of Civil Defense has observed:

> It would be difficult to overestimate the importance of Congress continuing to function in time of national emergency. The functions of the Congress become ever more important under such circumstances. The ability of the Congress to act swiftly is essential to the successful defense of the Nation.

If a sufficient number of Representatives were killed by an atomic blast, through germ warfare, or in the course of violent attacks by irresponsible partisans, the House of Representatives would be compelled to function without a majority of its Members. In such an event, any Member might raise a point of order, suggesting the absence of a quorum. Precedents indicate that such a point of order would not be sustained. But, even so, it is likely that in such times exceedingly important legislation would be adopted and any disfranchisement to a substantial portion of our Nation would represent a distinct loss.

It is true that the House of Representatives might, by amendment of its rules in advance, provide that a quorum should consist of a majority of the remaining Members whenever vacancies occur on a wholesale scale. Yet this change would not eliminate this danger entirely, for it is certainly possible that in an atomic attack, a sufficient number of Representatives would be incapacitated so that it might well prove incapable of mustering a quorum of the surviving Members.

This does not necessarily mean chaos in this country, for the Chief Executive would undoubtedly step into the breach and act without legislative sanction in the national interest as he perceived it at that time. However, there need be no departure from constitutional, representative government if precautionary steps are taken in advance of atomic catastrophe. This legislation represents such a precautionary step. It is not born of hysteria, but evolves from a desire to protect this Nation from undesirable consequences which may be occasioned by indifference to the dangers of the age in which we live.

The subject matter of this resolution has been considered by the Committee on the Judiciary since the 81st Congress (S.J. Res. 145).

In the 82d Congress, public hearings were held on Senate Joint Resolution 59. In the 83d Congress, public hearings were held on Senate Joint Resolution 39, and this resolution passed the Senate by a vote of 70 to 1 on June 4, 1954. In the 84th Congress, public hearings were held on Senate Joint Resolution 8, and this resolution, as amended, passed the Senate by a vote of 76 to 3 on May 19, 1955. During the 85th Congress, Senate Joint Resolution 157 was introduced, but no action was taken on it. During the present Congress, Senators Kefauver and Dodd sponsored Senate Joint Resolution 39, which is identical in text with the resolution (S.J. Res. 8) which passed the Senate in the 84th Congress. On March 9, 1959, the Standing Subcommittee on Constitutional Amendments, to which the resolution had been referred, decided that no further hearings were necessary and voted unanimously to recommend to the Committee on the Judiciary that it report the resolution favorably and without amendment.

The text of the resolution contains no reference to a disaster. Certain problems arise if the power may be invoked only when there is a disaster which causes a given number of vacancies. For instance, the question quickly arises as to what officer of government is to proclaim the disaster and how he is to determine which of the vacancies were caused by the disaster. Those problems are not presented here, for under this resolution the power which would be vested in the executive authority of each State is not predicated on any certification or proclamation. It is brought into being by an ascertainable fact, namely, the existence of 219 vacancies in the House of Representatives. In this manner, the amendment avoids the complications inherent in a proposal which requires that the vacancies must be caused by, or be the result of, a disaster. Yet there is no likelihood of abuse of this privilege for the very evidence of so many vacancies in the House of Representatives presupposes a disaster. Another complication which this concept avoids, and which must be reckoned with if the vacancies must be occasioned by a disaster, is the probability that appointments could not be made to fill vacancies created by natural causes either before or after the catastrophe.

The number of vacancies required by the amendment is substantial. The reason for this is apparent: there being no reference to a disaster the committee wanted to be sure that utilization of this authority would be sufficiently restricted, so that it would remain an emergency measure for the preservation and continuity of representative government. The maintenance of a large number of vacancies as a prerequisite to the use of the power constitutes insurance that it will be used only in the event of a disaster.

The committee desires to stress that these appointments will be temporary appointments. Article I, section 2, of the Constitution requires that a Governor issue writs of election when vacancies occur in the representation of his State in the House of Representatives. This amendment, by specific reference, emphasizes this requirement, so that, in most cases, an appointee's term will be limited to 60 to 90 days.

An analysis of the resolution will give some idea of its operation. Under the terms of the resolution, the power to appoint Representatives occurs only when the vacancies in the House of Representatives exceeds one-half of the authorized membership. The present membership of the House being 436, 219 vacancies would have to exist

before this extraordinary power could be invoked. The number of vacancies could exist for several days, but, as appointments are made by the Governors pursuant to this amendment, the number of vacancies naturally will diminish. On that date that the vacancies total less than 219, the time limit on this power begins to run. From that date, by the terms of the amendment, the Governors have 60 days within which to make the temporary appointment or the authority lapses and the office must be filled by election. If, within the 60-day period, additional vacancies arise from any cause, they also may be filled by gubernatorial appointment. Also, if for some reason the number of vacancies (having dropped below 219) rises again above that figure, the power to appoint again comes into existence.

These interpretations of the amendment are given by way of explanation, not in anticipation of difficulties in operation. Should unforeseen difficulties arise as the result of this grant of authority, the House of Representatives would act as final arbiter by reason of its constitutional authority to be the judge of the qualifications of its own Members (art. 1, sec. 5, of the Constitution).

CONCLUSION AND RECOMMENDATION

Naturally it is the fervent hope of the committee that the authority granted in this resolution need never be used. However, with some knowledge of the tremendous destructive power of thermonuclear weapons, it would be the height of folly to leave a constitutional gap of this nature in a representative government such as ours. When whole cities may be obliterated in a split second, the Congress cannot ignore, should it have any inclination to do so, the realities of this danger. The time for action to erase a defect in our Constitution, which could not have been contemplated at the time of its adoption, is at hand. It is pertinent to recall that, as a constitutional amendment, this measure must secure the approval of two-thirds of both Houses of Congress and the ratification by the legislatures of three-fourths of the several States. Since this action is somewhat time consuming the committee believes that this legislation should be approved promptly by the Senate, and the committee so recommends.

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